

Although other issues were raised by respondent at the preliminary hearing, Judge Frobish based his denial of benefits on a finding that claimant failed to prove “a work-related injury arising out of and in the course of her employment with the Respondent.” Accordingly, claimant’s Application for Review and brief describe the issue for review as whether claimant suffered injury by accident arising out of and in the course of employment. The Brief of the Appellee/Respondent to the Appeals Board (Board), however, also argues that claimant failed to give timely notice of her alleged accident. Therefore, whether claimant provided respondent with timely notice of her accident is also an issue for the Board’s review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant worked for respondent as a telephone sales representative from September 2000 until November 2001. She alleges she suffered a back injury each and every working day through November 11, 2001, her last day of work. Claimant alleges she told her supervisor, Margaret Bufford (formerly Margaret Nixon) many times that her back was hurting. Ms. Bufford testified and specifically denied having any knowledge of a work-related back injury. Respondent contends the first notice it received was claimant's Written Claim for Compensation dated May 14, 2002, and that this notice was insufficient to meet the requirements of K.S.A. 44-520. K.S.A. 44-520 provides the following:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant admits she did not give notice of a work-related accident to anyone else within 10 days, and she is not alleging that there was just cause for her failure to give notice within 10 days so as to extend the time for giving notice to 75 days after the date of accident. Likewise, claimant does not allege actual knowledge of accident by the employer or that the employer was unavailable to receive notice or that she was unable to give notice. Accordingly, if notice was not given to Ms. Bufford as alleged, then claimant's claim would be time barred by K.S.A. 44-520.

Claimant alleges a specific conversation took place with Ms. Bufford in September 2000 that caused her to seek treatment on her own with a chiropractor.

Q. All right. When was the first time you complained to Margaret Nixon about difficulties with your back due to this posture?

A. Well, it was in September - -

Q. September of what year?

A. 2000.

Q. All right. What did you say to her?

A. I told her that I am having lower back pain and that I needed to go to the chiropractor and find out what was going on.

Q. What did she say?

A. She said that was fine, to go. And I went to the chiropractor.

Q. What chiropractor did you go to?

A. Dr. Gage in Derby.

Q. All right. And did that alleviate the problem?

A. No.

Q. Did your problem get worse after that?

A. Yes, because we had to keep standing.

Q. Did you complain to Margaret again after that initial conversation with her about going to the chiropractor?

A. Yes, many times. I said the standing was killing my back.

Q. When was the next time, if you recall, talking to Margaret about your back problem?

A. Oh, gee, probably a week later. I mean it was a constant thing that I would tell her.

Q. How frequently would you tell Margaret Nixon that your back was hurting?

- A. At least two or three times a week.
- Q. And every time you told her your back was hurting, did you tell her that it was due to - -
- A. The standing.
- Q. - - bending at the waist and standing?
- A. The standing, yes, I did.
- Q. Did she ever tell you that she was going to file any workers' compensation paperwork for that?
- A. No, she didn't.
- Q. Did you ever ask her to file any workers' compensation paperwork for that?
- A. Huh-uh.
- Q. Why not?
- A. Because I wasn't sure that that was what was causing the problem.<sup>1</sup>

The chiropractor's records are not in evidence. The record does contain a Mileage Reimbursement Request Form showing eight trips to Dr. Cynthia Ward between October 1, 2001 and April 30, 2002; 14 trips to Joan Stevens for physical therapy beginning November 21, 2001; and, 16 trips to Dr. Dean Magee beginning April 18, 2002. The record also contains certain office notes and correspondence by orthopedic surgeon Robert L. Eyster, M.D., but he did not see claimant until May 2, 2002, which was almost 6 months after claimant last worked for respondent.

Claimant did not ask to fill out an accident report, nor did she ask for respondent to provide medical treatment. Conversely, claimant's supervisor Ms. Bufford, never asked claimant to fill out an accident report nor asked her if she needed medical treatment. Although it was not clear whether Ms. Bufford was authorizing claimant to seek treatment on her own with a chiropractor, there is no indication that claimant ever asked for the chiropractor's bill to be paid by respondent during the time she was employed there or

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<sup>1</sup> P.H. Trans., pp. 13-14.

before she filed her claim for compensation with the Division. Nevertheless, claimant contends she made it clear to Ms. Bufford that it was the standing, bending and stooping that was causing her back to be symptomatic.

Q. Did you continue to complain to Margaret Nixon, your immediate supervisor about - -

A. Yes.

Q. - - about your back being caused to suffer injury due to the bending and suffering?

A. Yes, I did.

Q. Did she at any time ever tell you to go to an MCI doctor?

A. No.

Q. Did she ever send you to any doctor anywhere for any type of medical treatment?

A. No.<sup>2</sup>

Claimant testified that she reported her complaints to Ms. Bufford on many occasions and that her co-workers that worked nearby would have heard these conversations. Claimant identified three such co-workers by name, Sage Ukens, Theresa Williams and Anthony Tuber.

Claimant was not the only witness to testify at the preliminary hearing. Her testimony that she gave notice of a work-related accident to Ms. Bufford was contradicted by Ms. Bufford herself who testified that claimant told her about having problems with her back, but never mentioned that she had an accident or that she injured her back at work.

Q. Now, during the time that Miss Briggs was working, did she complain to you that having to stand on the job was causing a problem with her back?

A. No.

Q. Did she complain to you that she had hurt her back at MCI?

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<sup>2</sup> P.H. Trans., p. 17.

A. No.

Q. Did she ever tell you that she had or that any of that activity at MCI was causing any physical problems for her?

A. No.

Q. When was the first time you found out that she was making complaints that her back was hurting because of work at MCI?

A. About two weeks ago when I got notice to come to this hearing.

Q. All right. Did Miss Briggs tell you about having problems with her back?

A. Yes, she had told me because she had scheduled an appointment with a chiropractor.

Q. Yes.

A. And at that time she had just purchased a house and her and her husband had put up a fence themselves.

Q. Did she complain - - what was it about putting up that fence that was a problem?

A. Just manually doing the work and holding the boards.

Q. Did she indicate that was causing problems with her back?

A. Yes, because that's when she wanted to go to the chiropractor.<sup>3</sup>

Ms. Bufford also testified that she knew claimant did not like to stand and therefore was not required to do so. She said that if claimant had reported a work injury to her, she would have sent claimant to the on-site company nurse.

The only other testimony came from one of claimant's former co-workers, Bianca Sage Ukens, who worked for respondent from January 2, 2001 until December 14, 2001. She heard claimant complain about her back problems to Ms. Bufford. According

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<sup>3</sup> P.H. Trans., pp. 53-54.

to Ms. Ukens, claimant specifically related her back problems to having to stand and bend at the waist at work.

The Board finds that claimant gave Ms. Bufford timely notice of a work-related accident and that claimant sustained a work-related injury to her back. However, the record does not establish whether that injury was temporary or permanent. Furthermore, claimant has failed to prove that her subsequent need for back surgery was due to a back injury that arose out of and in the course of her employment with respondent. As claimant failed to establish a direct connection between her work that ended November 11, 2001 and her surgery in June of 2002, the Order of the Administrative Law Judge should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that, although for different reasons, the preliminary hearing Order entered by Administrative Judge Jon L. Frobish on July 25, 2002, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2002.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Director, Division of Workers Compensation

**DONETTA J. BRIGGS**

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**DOCKET NO.1,003,978**